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No. 07-

IN THE
Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner's federal sentence run consecutively to a state sentence that has yet to be imposed. That ruling perpetuates a direct and acknowledged circuit conflict concerning a federal district court's authority under 18 U.S.C. § 3584(a) – the statute governing consecutive and concurrent sentences – to order a federal sentence to be served consecutively to a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack such authority.

The question presented is:

Whether a district court has authority to order a defendant's federal sentence to be served consecutively to a state sentence that has not yet been imposed.

PARTIES TO THE PROCEEDING

Petitioner is Sergio Martinez-Guerrero, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sergio Martinez-Guerrero respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but is available at 2008 WL 245010 and reprinted at App. 1a-2a. The district court issued no opinion; its judgment is reprinted at App. 13a-15a.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2008. App. 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 20a-23a.

INTRODUCTION

This case presents a question that has deeply divided the federal circuits: whether a district court has authority to order a federal sentence to be served consecutively to a state sentence that has not yet been imposed. Of the eight circuits that have addressed the question, four have held that a district court lacks authority to impose such a sentence, while four have held that a district court has such authority. The Government has acknowledged the circuit conflict.

Despite the controversy in the circuits on the question, its proper resolution is not difficult. The statute governing a court's authority to impose a consecutive sentence, 18 U.S.C. § 3584(a), simply does not give a federal district court the authority to order a federal sentence to be served consecutively to a state sentence that has not yet been imposed. Indeed, in recent filings in this Court, the Government has not even attempted to defend the practice on its merits.

In this case, the district court, over petitioner's objection, ordered petitioner's federal sentence to be served consecutively to a state sentence yet to be imposed. In reliance on longstanding circuit precedent authorizing such sentences, the court of appeals affirmed. This Court should grant review to resolve the circuit conflict and end this impermissible federal sentencing practice.

STATEMENT OF THE CASE

1. Petitioner is a citizen of Mexico. On August 31, 2006, he was deported from the United States to Mexico. App. 11a. On January 26, 2007, he was found by an immigration agent in Tahoka, Texas. *Id.*

On February 21, 2007, the government filed a single-count indictment against petitioner, alleging that he had illegally re-entered the United States after deportation, in violation of 8 U.S.C. § 1326. App. 7a-8a. Petitioner pleaded guilty to the indictment pursuant to a written plea agreement. *See* App. 4a.

2. On July 20, 2007, the United States District Court for the Northern District of Texas sentenced

petitioner to 42 months of imprisonment and 3 years of supervised release. App. 4a-5a. The district court specifically ordered that the federal term of imprisonment "run consecutive with any sentence imposed in Case Number 01CR055949 pending in the Durham County District Court of Durham, North Carolina." *Id.* The case pending in North Carolina involves a charge of misdemeanor assault on a female. PSR ¶ 28. Petitioner "object[ed] to the imposition of time consecutive to an, as yet, unimposed sentence." App. 5a. The district court overruled the objection.

Later that day, petitioner filed a motion to correct his sentence on the ground that, because he had no prior criminal convictions, the statutory maximum sentence was 24 months. The district court agreed and changed the sentence to 24 months, again "to run consecutive with any sentence imposed in Case No. 01CR0055949, Durham County District Court, Durham, North Carolina." App. 15a.

3. Petitioner appealed and argued that "the district court reversibly erred" when it ordered that his federal sentence run consecutively to a yet-to-be-imposed state sentence. Pet. C.A. Br. 6-7. Petitioner recognized that the Fifth Circuit's decision in *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991), foreclosed his claim. In *Brown*, the Fifth Circuit held that a district court has authority to order that a federal sentence be served consecutively to a future state sentence. *Id.* at 1217.

The government filed a motion to dismiss petitioner's appeal or summarily affirm the district court's judgment on the ground that petitioner's "argument is foreclosed . . . pursuant to *United States v.*

Brown, 920 F.2d 1212 (5th Cir. 1991)." Gov't C.A. Motion 1-2. The court of appeals granted the motion for summary affirmance. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit in this case held that a district court has authority to order that a federal sentence run consecutively to a yet-to-be-imposed state sentence. That holding perpetuates an entrenched circuit conflict. Four circuits, including the Fifth Circuit, have held that a district court has discretion to order a sentence to be served consecutively to a future state sentence. Four circuits have held that a district court has no such authority. Review is warranted to resolve that conflict.

Review is also warranted because the decision below approves a wholly unjustified sentencing practice. A district court's authority to impose a consecutive sentence is governed by 18 U.S.C. § 3584(a), and the plain language of that provision does not authorize the court to order a federal sentence to be served consecutively to a future state sentence. All other relevant sources of statutory construction confirm that a district court lacks such authority.

The question presented is also one of recurring importance to the administration of justice in the federal system. It potentially arises in every case in which there is a federal and state prosecution for the same underlying criminal conduct. And it has enormous practical significance. The length of a criminal defendant's combined state and federal incarceration can vary tremendously depending on whether the defendant receives a consecutive or a concurrent state sentence. The fact that criminal

defendants in four circuits can obtain the benefit of a concurrent state sentence, while criminal defendants in four other circuits cannot, is an intolerable disparity in federal criminal punishment standards.

In filings in this Court, the Government has acknowledged the conflict in the circuits on the question presented in this case. And in recent filings, it has declined to defend the practice of ordering a sentence to be served consecutively to a future state sentence. The time has come to resolve the conflict in the circuits and to end this unauthorized and unlawful federal sentencing practice.

I. The Circuits Are Deeply Divided On The Question Presented

The courts of appeals are divided on the question whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. The Second, Sixth, Seventh, and Ninth Circuits have held that a district court lacks authority to impose such a sentence. *See United States v. Donoso*, ___ F.3d ___, 2008 WL 878562, at *1, *3 (2d Cir. 2008) ("[U]nder 18 U.S.C. § 3584(a) [a] district court [i]s not authorized at the . . . sentencing hearing to direct that [defendant's] sentence run consecutively to a not-yet-imposed state sentence."); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998) ("18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("Neither § 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his

sentence must run consecutively to some sentence that may be imposed in the future."); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (A "federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed."); *see also United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("The plain language of [§ 3584(a)] does not grant a district court authority to order that its sentence run consecutively to a future sentence.").

In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has authority to order a federal sentence to be served consecutively to a future state sentence. *See United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir. 1991) (per curiam) ("[A] federal district court may prospectively forbid its sentence from being served concurrently with any sentence that may subsequently be handed down by a state court."); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("Neither the statute nor the Guidelines directly address whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence," and therefore, the authority to do so is within the district court's "broad discretion."); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) ("The plain meaning of [Section 3584(a)] is that multiple terms of imprisonment imposed at different times will normally run consecutively[,]" and "no language in section 3584(a) prohibit[s] a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed."); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[A] dis-

trict court [has] the authority to impose a federal sentence consecutive to an unrelated, unimposed state sentence on pending charges."); *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003) (per curiam) ("[W]e cannot ignore *Ballard*'s clear holding that a court does have the authority to impose a consecutive sentence to an unimposed, future sentence.").

This case directly implicates that circuit conflict. Over petitioner's objection, the district court ordered petitioner's sentence to be served consecutively to a future state sentence. Relying on its decision in *Brown*, the Fifth Circuit affirmed that sentence as within the district court's discretion. Had petitioner appealed in the Eighth, Tenth, or Eleventh Circuits, his sentence would also have been affirmed. On the other hand, if petitioner had appealed in the Second, Sixth, Seventh, or the Ninth Circuits, his sentence would have been reversed. That categorical geographic disparity in federal sentencing is irrational, unfair, and unacceptable, and it should not be allowed to persist.

II. The Court of Appeals' Decision Is Incorrect

The Fifth Circuit erred as a matter of law in approving the sentence in this case. A federal district court's authority to impose a consecutive sentence is governed by 18 U.S.C. § 3584(a), which does not authorize a court to order a federal sentence to be served consecutively to a future state sentence.

1. Section 3584(a) authorizes a district court to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*,"

or (2) "if a term of imprisonment is imposed on a defendant who is *already subject* to an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). Neither circumstance is present when a court imposes a federal sentence on a defendant who has not yet received a state sentence. The federal and state sentences are not imposed "*at the same time*," and the defendant is not "*already subject* to an undischarged term of [state] imprisonment." The plain language of § 3584(a) therefore does not authorize a district court to order a sentence to be served consecutively to a future state sentence.

In *Brown*, the Fifth Circuit nevertheless held that § 3584(a) allows such sentences. *See* 920 F.2d at 1216-17. But the court made no effort to reconcile that holding with the plain language of the statute. *Id.* Indeed, a subsequent panel of the Fifth Circuit has criticized *Brown* on precisely this ground. *See United States v. Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000) (per curiam). But the Fifth Circuit has repeatedly reaffirmed *Brown*, with no further explanation of that decision. *See infra* note 1.

2. Other courts, however, have sought to justify the kind of consecutive sentence imposed in this case primarily on the basis of the second and third sentences of § 3584(a). The second sentence provides that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." 18 U.S.C. § 3584(a). The third sentence provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." *Id.*

Those two sentences neither add nor detract from the court's authority to impose a consecutive or concurrent sentence under the first sentence of § 3584(a). They merely establish default rules that apply in the two circumstances in which a district court has such authority, but fails to make its sentencing intentions clear. Thus, tracking the first circumstance – when sentences are imposed "at the same time" – the second sentence specifies that "multiple terms of imprisonment imposed at the same time run concurrently" unless the court directs otherwise. 18 U.S.C. § 3584(a). And tracking the second circumstance – when a defendant is "already subject" to another sentence – the final sentence of § 3584(a) specifies that "[m]ultiple terms of imprisonment imposed at different times run consecutively" unless the court directs otherwise. *Id.*

A number of courts have nonetheless read the final two sentences as if they were freestanding rules, unconnected to the first sentence. The Tenth Circuit, for example, has read the final sentence to apply to the circumstance in which a state sentence has not yet been imposed and to authorize a district court to order a consecutive sentence in that circumstance. *Williams*, 46 F.3d at 59. And the Seventh Circuit has interpreted the final sentence to make a future state sentence "automatically consecutive." *Romandine*, 206 F.3d at 738. Both readings violate the cardinal principle that the words of a statute cannot be read "in isolation," but must be read in the "context" of the statute as a whole. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

When read in context, the meaning of the final two sentences is clear. As the Sixth Circuit has ex-

plained, the language in those two sentences "neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court's authority; it establishes a default rule that applies if a district court fails to specify whether a sentence should run concurrently or consecutively *and* either of the initial two conditions are satisfied." *Quintero*, 157 F.3d at 1040 (emphasis added). The Second Circuit and the Fourth Circuit have similarly pointed out that the "presumptions established by the last two sentences of § 3584(a) must be read in light of [the] limiting language at the beginning of the section," *McCarthy v. Doe*, 146 F.3d 118, 121-22 (2d Cir. 1998), and that the "presumption" of a consecutive sentence established by the final sentence therefore "does not take effect unless a court imposes a sentence *after* a defendant is already subject to an undischarged term of imprisonment," *Smith*, 472 F.3d at 226 (emphasis added).

3. The practice of ordering a sentence to be served consecutively with a future state sentence also cannot be reconciled with 18 U.S.C. § 3584(b). That provision requires a district court, when "determining whether the terms imposed are to be ordered to run concurrently or consecutively," to consider "the factors set forth in [18 U.S.C. §] 3553(a)." Section 3553(a), in turn, instructs the court to consider, *inter alia*, (1) the need for the sentence "to provide just punishment for the offense" and "to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(A), (B); and (2) "the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6).

A district court cannot intelligently perform its duty to consider those factors in determining whether to impose a consecutive or concurrent sentence when it does not know what the state sentence will be. As the Fourth Circuit has explained, "[o]nly a court that sentences a defendant already subject to an undischarged term of imprisonment could properly consider whether a consecutive or concurrent sentence best serves the goals of § 3553(a), as only that court knows the circumstances attending the later sentence." *Smith*, 472 F.3d at 227.

This Court's decision in *Rita v. United States*, 127 S. Ct. 2456 (2007), confirms that a court cannot properly exercise its authority to determine whether to impose a consecutive or concurrent sentence in light of the factors set forth in § 3553(a) without knowing what the length of the state sentence will be. In *Rita*, the Court held that a district court's sentence must be the product of a "reasoned" decisionmaking process. *See id.* at 2468. A court cannot engage in "reasoned" decisionmaking when it does not have any idea of the length of the sentence that a state court will impose. As Judge Newman has explained, "[t]he length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively." *Salley v. United States*, 786 F.2d 546, 548 (2d Cir. 1986) (Newman, J., concurring in result).

The Fifth Circuit's decision in *Brown* illustrates the dimensions of this problem. In that case, the

Fifth Circuit affirmed a district court's order that the federal sentence be served consecutively to a future state sentence even though the range of the state sentence for the crime could have been from ten years to 99 years without benefit of parole, probation, or suspension of sentence. *See Brown*, 920 F.2d at 1213 (sentence ordered consecutive to any future Louisiana state sentence for same bank robbery); La. Rev. Stat. § 14:64(B) (establishing the sentencing range for armed robbery). Without knowing where in that range the state sentence would fall, the district court could not make a reasoned decision on whether to impose a consecutive or concurrent sentence.

4. There is another reason § 3584(a) cannot be read to authorize a court to order a sentence to be served consecutively with a future state sentence. When a federal court imposes such a sentence, it intrudes on a state court's legitimate interest in deciding for itself whether to make a state sentence concurrent or consecutive to a preexisting sentence. Most states give the trial court authority to order a state sentence to be served concurrently to a preexisting federal sentence. *See Note, Sovereignty In Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 Val. U. L. Rev. 1035, 1050 & n.67 (2003); *see also* N.C. Gen. Stat. § 15A-1354(a) ("[W]hen a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court."). When a federal court orders a

federal sentence to be served consecutively to a future state sentence, it necessarily "infringes on the right of the state to exercise its own sentencing prerogatives." *Clayton*, 927 F.2d at 493. Such a federal sentence, "if given effect, would preempt the right of the state to apply its own laws on sentencing for violation of state criminal laws." *Id.* (internal quotation marks omitted).

Congress would presumably have authority under the Supremacy Clause to preempt the state's traditional exercise of sentencing authority. But Congress is not presumed to encroach on significant state interests unless Congress has "ma[d]e its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). While "Congress may legislate in areas traditionally regulated by the States," this is "an extraordinary power in a federalist system" – a power courts "must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Nothing in the language of § 3584(a) reflects any intent by Congress to intrude on the state court's traditional authority to make its sentence concurrent to a preexisting sentence. To the contrary, the language of § 3584(a) expressly confines a federal court's authority to the situation in which a state court has already imposed a sentence. The rule reflected in § 3584(a) thus harmonizes federal and state interests by recognizing that the second sentencing court is in the best position to determine whether a state and federal sentence should run consecutively or concurrently.

5. Finally, the legislative history of § 3584 confirms Congress's understanding that a federal court would not have authority to order a state sentence to be served consecutively to a future state sentence. In discussing when a district court would have authority to order a sentence to be served consecutively with a state sentence, the Senate Report refers to "a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense." S. Rep. No. 98-225, at 126 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3309. The Report does not suggest that a district court would have authority to order a sentence to be served consecutively to a future state sentence. In fact, the Report expresses a clear preference for providing the *last* sentencing court with the discretion necessary to tailor a sentence to the defendant's criminal history. *See id.* at 132-33 (allowing court sentencing defendant on new charges to adjust an earlier term of probation because "the new court will be in a better position to know whether a change in the term of probation is justified" and can "adjust the term of probation or supervised release as needed to serve the purpose of sentencing on the new charge").

The Senate Report thus underscores what is otherwise clear from the plain language of § 3584(a), the requirement in §§ 3584(b) & 3553(a) that the district court make a reasoned determination on whether to make a sentence concurrent or consecutive, and the strong presumption that Congress does not intend to intrude on traditional state interests: a district court is without authority to order a federal sentence to be served consecutively to a future state sentence.

III. The Question Presented Is One Of Recurring Importance To The Administration Of Justice

1. The question whether a district court may order a federal sentence to be served consecutively to a yet-to-be-imposed state sentence is a recurring issue of substantial national significance. The question potentially arises in every case in which a defendant is subject to both federal and state charges for the same underlying conduct. Given the many areas of substantial overlap between federal and state criminal law, that situation is common today. *See Lopez v. Gonzales*, 127 S. Ct. 625, 630 n.6 (2006) (discussing federal drug felonies and "their state counterparts"); Fed. R. Crim. P. 6(e)(3)(A)(ii), advisory committee note (1985 amendments) (noting overlapping jurisdiction "in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations").

The very fact that eight circuits have now addressed the question presented in this case attests to its recurring importance. Criminal defendants have repeatedly challenged the legitimacy of the practice in appeals to the Fifth Circuit.[1] The issue also has

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[1] In addition to this case, see *United States v. Lowery*, No. 07-11117, 2008 WL 899234, at * 1 (5th Cir. April 4, 2008); *United States v. McEver*, No. 07-10773, 2008 WL 244961, at *1 (5th Cir. Jan. 30, 2008); *United States v. Moreno-Calzada*, No. 07-10526, 2008 WL 205076, at *1 (5th Cir. Jan. 24, 2008); *United States v. Johnson*, 257 F. App'x 798, 799 (5th Cir. 2007) (no plain error); *United States v. Williams*, 256 F. App'x 729 (5th Cir. 2007); *United States v. Noyola*, 254 F. App'x 317 (5th Cir. 2007) (issue raised but mooted when state charges dismissed); *United States v. Gamez*, 253 F. App'x 437 (5th Cir. 2007); *United States v. Goodgion*, 253 F. App'x 403 (5th Cir.

repeatedly arisen in other circuits. Courts of appeals regularly confront the issue not only in direct appeals[2] but also in petitions for federal post-conviction or habeas relief.[3]

2007); *United States v. Hughes*, 237 F. App'x 980 (5th Cir. 2007) (no plain error); *United States v. Rothrock*, 234 F. App'x. 230 (5th Cir. 2007); *United States v. Rivero-Formoso*, 239 F. App'x 60 (5th Cir. 2007) (no plain error); *United States v. Blakey*, 237 F. App'x 927 (5th Cir. 2007); *United States v. King*, 225 F. App'x 250, 250-251 (5th Cir. 2007); *United States v. Guerrero*, 225 F. App'x 239 (5th Cir. 2007) (no plain error); *United States v. Lopez*, 222 F. App'x 404, 405 (5th Cir. 2007) (per curiam); *United States v. Rodriguez-Gutierrez*, 119 F. App'x 681 (5th Cir. 2005) (no plain error), *cert. granted and remanded on other grounds*, 544 U.S. 1047, *sentence aff'd*, 428 F.3d 201 (5th Cir. 2005), *cert. denied*, 546 U.S. 1193 (2006); *United States v. Lackey*, 115 F. App'x 260 (5th Cir. 2004); *United States v. Martinez*, 110 F. App'x 462 (5th Cir. 2004); *United States v. Lujan*, 996 F.2d 307 (5th Cir. 1993); *see also United States v. Quintana-Gomez*, No. 07-10139, 2008 WL 763368 (5th Cir. March 25, 2008) (district court lacks authority to order sentence consecutive to future federal sentence).

[2] *See, e.g., United States v. Crawford*, 217 F. App'x 774 (10th Cir. 2007); *United States v. Shehadeh*, 193 F. App'x 626 (7th Cir. 2006); *United States v. McDaniel*, 338 F.3d 1287, 1288 (11th Cir. 2003); *United States v. Sumlin*, 317 F.3d 780, 782 (8th Cir. 2003); *United States v. Randolph*, 80 F. App'x 190 (3d Cir. 2003) (district court did not commit plain error in ordering federal sentence consecutive to any subsequent state sentence); *United States v. Samour*, 199 F.3d 821 (6th Cir. 1999) (holding argument waived); *United States v. Abro*, 116 F.3d 1480, 1997 WL 345736, at *1 (6th Cir. 1997) ("A district court does not have the authority to impose a federal sentence to run concurrently to a state sentence that had not yet been imposed.").

[3] *See, e.g., Brown v. Ashcroft*, 41 F. App'x 873 (7th Cir. 2002); *Jones v. Winn*, 13 F. App'x 419 (7th Cir. 2001); *Romandine*, 206 F.3d at 737; *see also Cozine v. Crabtree*, 15 F. Supp. 2d 997 (D. Or. 1998).

The proper interpretation of § 3584 has also spawned satellite litigation on related issues. For example, one related question is whether, in order to enter an intelligent guilty plea, a defendant must be informed of the court's authority to enter a consecutive sentence. *See United States v. Neely*, 38 F.3d 458, 461 (9th Cir. 1994) ("[b]ecause the imposition of a consecutive sentence is a direct consequence of a federal guilty plea where the federal court lacks discretion to order a concurrent sentence, a federal defendant must be advised of the court's lack of discretion before he can enter a voluntary plea of guilty"). *But see Hernandez*, 234 F.3d at 256 (holding information not required regardless of proper interpretation of § 3584(a)). Another related question is whether a defense counsel who fails to raise the issue has engaged in ineffective assistance. *United States v. Smith*, 101 F. Supp. 2d 332, 346 (W.D. Pa. 2000) (rejecting defendant's argument that counsel was ineffective because he failed to request that federal sentence be made concurrent to future state sentence, on the ground that court had no authority to make such an order).

Litigation over the proper interpretation of § 3584(a) and the related litigation that controversy has spawned places a significant and needless drain on the federal judicial system. And there is no end in sight. On the contrary, the number of cases presenting that issue will inevitably increase until this Court settles the matter.

2. There is also an urgent need for the Court to resolve this issue because of its importance to the fair administration of justice in the federal system. The length of time that a criminal defendant is in-

carcerated can differ dramatically depending on whether his federal and state sentences or concurrent or consecutive. Whatever the difference in sentences, however, one thing should be clear: a defendant's opportunity to obtain a concurrent state sentence should not vary depending on the circuit in which he is sentenced. That is true even when the difference between a concurrent and a consecutive sentence can be measured in months rather than years. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

IV. The Government's Categorical Reasons For Opposing Review Of The Conflict Are Unpersuasive

Given the breadth and the depth of the circuit conflict on this issue, it is no surprise that certiorari has been sought in prior cases. The Government successfully opposed review in those cases, but it has primarily emphasized case-specific objections with no application here. The Government has also offered two categorical reasons for denying certiorari, but especially given the importance and recurring nature of the issue, those reasons do not support continued avoidance of this question.

1. The Government has consistently acknowledged that there is a square conflict in the circuits on the question whether a federal district court has authority to order that a federal sentence be served consecutively to a yet-to-be-imposed state sentence. *See* Br. in Opp. in *Lopez v. United States*, No. 07-5060, at 9 (identifying 4-4 circuit split); *see also* Br.

in Opp. in *King v. United States*, No. 07-5307, at 6 (identifying 4-3 circuit split on the issue); Br. in Opp. in *Cox v. United States*, No. 05-454, at 5 (identifying 4-3 circuit split). Moreover, in a departure from the Government's usual practice of defending the merits of decisions from which review has been sought, the Government in its recent filings has not offered any substantive defense of the practice of sentencing a defendant to a sentence that is consecutive to a future state sentence. Br. in Opp. in *King*, at 6-11; Br. in Opp. in *Lopez*, at 10-14; Br. in Opp. in *Cox*, at 6-9.

2. The Government has nonetheless repeatedly opposed certiorari when review has been sought on this issue. While the Government has often emphasized case-specific grounds for its opposition, it has also offered two arguments that, if accepted, would preclude review in every case. Neither argument is a valid reason for allowing an entrenched circuit conflict – and an illegitimate federal sentencing practice – to persist forever.

a. The Government's principal argument is that these unlawful sentencing orders may freely continue because they are not actually binding on state courts, contrary to the understanding of the federal courts who issue them. Br. in Opp. in *King*, at 7. In particular, the Government has asserted that a state court can negate the federal court's order and give a sentence that is effectively concurrent in two ways. On the one hand, if the defendant is in federal custody at the time of state sentencing, the state court can defy the federal court's order by designating the federal institution for service of the state sentence. *Id.* at 9. On the other hand, if the defendant is in state custody at the time of state sentencing, the

state court can circumvent the federal court's order by deducting the length of the federal sentence from the sentence that the state court would otherwise impose. *Id.* at 7-9. These proposals for circumventing the unlawful federal sentencing practice at issue here are unsound.

First, a federal court "order" that makes a federal sentence consecutive to a future state sentence places an illegitimate obstacle in the path of a defendant seeking a concurrent sentence from a state court. *See Clayton*, 927 F.2d at 493. Even assuming that a federal court order is not binding on a state court under the Supremacy Clause, that does not mean that a state court will view it as nonbinding. Moreover, even if the state court views it as nonbinding, that does not mean that the state court will not defer to a federal court order based on principles of comity. Indeed, the very case on which the Government relies (in asserting that the federal court's order is not binding) establishes that principles of comity do govern the relationship between the state and federal systems in sentencing matters. *See Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922). Accordingly, it cannot seriously be disputed that a defendant seeking a concurrent state sentence from a state court will have a better chance of obtaining one if the state court is not presented with a federal court "order" requiring the federal sentence to be served consecutively. The Government suggests no basis for concluding otherwise.

Second, while this Court has called for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in the area of sentencing, *Ponzi*, 258 U.S. at 259, the Government's approach

promotes a spirit of unseemly gamesmanship. As the Government sees things, a federal court may issue an order that appears to be binding but actually is not, in the hopes of confusing or seducing the state court or otherwise affecting the state court's sentence. In response, the state court – coincidentally cognizant of the legal reality the federal court ignored or misrepresented – then uses means at its disposal to defy or circumvent the federal court's order. That is not how the relationship between federal and state courts should function. A state court should not be placed in the position of having to defy or circumvent an illegitimate federal court order in order to achieve its legitimate sentencing objectives.

Third, the Government's approach imperils a state's ability to achieve its sentencing objectives, particularly when a defendant is in state custody. In that situation, the Government recommends that a state court should cut the sentence it would otherwise impose by the length of the federal sentence. That approach may not even be feasible when there is a state mandatory minimum or when the state wishes to adhere to a specified Guidelines range. *See, e.g., Ballard*, 6 F.3d at 1504 & n.1 (state mandatory minimum sentence of ten years).

Moreover, the Government's approach falsely assumes that a sentence that is reduced by the length of the federal sentence will accomplish the state's sentencing goals. For example, when a federal court issues a 10-year sentence to a bank robber, and the state court believes that the defendant should receive a concurrent state sentence of 10 years and six months for the crime of armed robbery, the Government recommends that the state court circumvent

the federal court order by giving the bank robber a six-month sentence. That is no solution at all for a state court that believes that a six-month sentence under state law amounts to a slap on the wrist for a serious crime. Beyond that, the state court cannot even be sure that the defendant will serve a 10-year federal sentence. Should a federal court decide to cut the federal sentence in half in order to reward substantial cooperation, there would be nothing that the state could do. Should the defendant successfully appeal his federal conviction, and should the Government decide not to prosecute him again, there would be nothing the state could do. A state court should not have to depend on a federal sentence to vindicate its own interests.

Finally, while the Government seeks to make a virtue of the nonbinding nature of the federal court's consecutive sentence order, that actually makes matters worse, not better. There is a strong federal interest in having the orders of federal courts obeyed. When a federal court order can be freely defied or circumvented, it denigrates federal judicial power. Indeed, an Article III judge has no business issuing an order that is not binding. An order's legally binding nature is what distinguishes the exercise of legitimate judicial power under Article III from impermissible advisory opinions. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948). Thus, if federal courts cannot issue binding orders making federal sentences consecutive to future state sentences, the proper solution is not to hope that state courts will

defy or circumvent such orders. The solution is for federal courts to stop issuing such orders.

b. The Government has also opposed review on the ground that a defendant who prevails in this Court might still be subject to a consecutive sentence on remand. In particular, the Government contends that if the Court holds that a district court has no authority to impose a sentence that is consecutive to a future state sentence, a court could impose a consecutive sentence on remand if the state court has imposed its sentence in the meantime. The federal district court would have authority to issue a consecutive sentence, the Government asserts, because the defendant by then would be "already subject to an undischarged term of imprisonment." Br. in Opp. in *King*, at 10-11 (quoting 18 U.S.C. § 3584(a)).

That analysis, however, rests on the mistaken premise that that the district court would necessarily have authority to issue a consecutive sentence in that circumstance. In cases in which a district court has committed legal error, this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. When a district court has erred in imposing an unlawful consecutive sentence, what is "just under the circumstances" is "to place" a defendant "in the position" he "would have occupied in the absence of" the error. *United States v. Virginia*, 518 U.S. 515, 547 (1996); *see Nix v. Williams*, 467 U.S. 431, 443 (1984). Consistent with that principle, if petitioner prevails on the question presented here, this Court can remand with directions that the sentence be modified to delete the order making the federal

sentence consecutive to the subsequent state sentence.

Even assuming that the district court would be free on remand to impose a consecutive sentence, that cannot justify failing to correct the impermissible consecutive sentence that it has imposed. It is frequently true that a district court that exercises discretion based on an impermissible view of the law will be free to make the same decision based on a permissible view of the law. But that possibility does not mean that an appellate court should leave that legal error uncorrected. Instead, the appropriate response is to reverse and remand for an exercise of discretion under the correct rule of law. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008); *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982); *cf. Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

The Government's argument is also doubly speculative. It rests on speculation that the state court will issue a sentence before the case reaches the federal district court on remand. And it rests on speculation that the federal district court would then issue a consecutive sentence on remand. That kind of speculation is not a legitimate ground for failing to correct a clear legal error.

3. In the end, what should be dispositive here is that, unless this Court intervenes, a continuing and endlessly repeated sequence of events that should be unacceptable in our federal criminal justice system is guaranteed. In at least four circuits, federal district courts will continue to impose illegal consecutive sentences. Federal prosecutors will continue to

either encourage the practice or defend it on appeal. The Solicitor General apparently will continue to avoid defending the practice in this Court, yet presumably will not urge the Court to correct it. At the same time, state courts will continue to be placed in the position of having to defy federal court orders in order to fulfill their sentencing objectives or having to order statutory minimum sentences that far exceed their conception of reasonable punishment when imposed consecutively. And criminal defendants in some circuits will continue to serve significantly longer sentences than similarly situated defendants in other circuits. That cycle of events does great damage to the administration of justice in the federal judicial system. Now is the time to end it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 29, 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10787
Conference Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SERGIO MARTINEZ-GUERRERO,
also known as Tony Guerrero-Salvador

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:07-CR-14-ALL

Before REAVLEY, BENAVIDES, and ELROD, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Sergio Martinez-Guerrero presents arguments that he concedes are foreclosed by *United States v.*

Brown, 920 F.2d 1212, 1216-17 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006), which held that a district court may order a term of imprisonment to run consecutively with an unimposed state sentence. The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.

FILED JANUARY 30, 2008

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	)	No. 5:07-CR-014-C
VS.	)	LUBBOCK, TEXAS
SERGIO MARTINEZ-GUERRERO, DEFENDANT,	)	JULY 20, 2007

SENTENCING HEARING
BEFORE THE HONORABLE SAM R. CUMMINGS,
UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Government:
UNITED STATES ATTORNEY'S OFFICE
1205 TEXAS AVENUE, SUITE 700
LUBBOCK, TEXAS 79401
By:DENISE B. WILLIAMS

For the Defendant:
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1205 TEXAS AVENUE, SUITE 506
LUBBOCK, TEXAS 79401
By:DAVID E. SLOAN

Official Court Reporter: MECHELLE DANIEL
1205 TEXAS AVENUE
LUBBOCK, TEXAS 79401
(806) 744-7667

Interpreter: ISABEL McSPADDEN

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

* * *

[3]

[THE COURT]: Mr. Martinez, you pleaded guilty to the indictment charging you with illegal reentry after deportation. You having pleaded guilty to that charge, I found you guilty, and I am now adjudging you guilty of that offense.

Having adjudged you guilty, I am now going to impose the following sentence:

First, I'm ordering that you pay a special assessment

[4]

of $100.

Next, I'm ordering that you be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 42 months, with this term of imprisonment to run consecutive with any sentence imposed in Case Number

01CR055949 pending in the Durham County District Court of Durham, North Carolina.

* * *

[THE COURT]: I will recommend that Mr. Martinez be placed at FCI La Tuna.

Upon your release from incarceration, I'm ordering that you serve a 3-year term of supervised release. You will get a copy of the judgment so you will know what the conditions of supervision are. There are some standard conditions, as well as special conditions.

Some of the special conditions include the following:

First, you shall not illegally reenter the United States if you are deported.

Next, you shall cooperate in the collection of any DNA as directed by the United States Probation Office.

* * *

[6]

Now, Counsel, you may voice your objections.

[MR. SLOAN]: Thank you, Your Honor.

First of all, I would object to the imposition of time consecutive to an, as yet, unimposed sentence. It's my understanding that there is a circuit split on whether the

[7]

Court has the authority to do that, and I would like to make that objection in order to preserve that issue for appeal.

* * *

(END OF HEARING)

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 5-07-CR-0014-C
	§	
SERGIO MARTINEZ-GUERRERO a/k/a "Tony Guerrero-Salvador"	§	

INDICTMENT

The Grand Jury Charges:

Count One
Illegal Re-Entry After Deportation
(Violation of 8 U.S.C. § 1326 and
6 U.S.C. §§ 202(3), 202(4) and 557)

On or about January 26, 2007, in the Lubbock Division of the Northern District of Texas, and elsewhere, **Sergio Martinez-Guerrero a/k/a Tony Guerrero-Salvador**, defendant, an alien, knowingly entered, attempted to enter, and was found in the United States of America after having been denied admission, excluded, deported, and removed therefrom at or near the Port of Deportation at El Paso, Texas, on or about August 31, 2006, and not having received the express consent of the Attorney General of the United States and the Secretary of Homeland Security to apply for readmission to the United States since the time of

his previous denial of admission, exclusion, deportation, and removal therefrom.

In violation of 8 U.S.C. § 1326, and 6 U.S.C. §§ 202(3), 202(4) and 557.

REDACTED

RICHARD B. ROPER
UNITED STATES ATTORNEY

/s/ Denise Williams
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FILED: FEB. 21, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

THE UNITED STATES OF AMERICA

V.

SERGIO MARTINEZ-GUERRERO
a/k/a "Tony Guerrero-Salvador"

INDICTMENT

8 U.S.C. § 1326
6 U.S.C. §§ 202(3), 202(4), and 557
Illegal Re-Entry After Deportation

(1 COUNT)

REDACTED

Filed in open court this 21st day of February, A.D. 2007.

DEFENDANT IN FEDERAL CUSTODY

/s/ illegible signature
UNITED STATES MAGISTRATE JUDGE
Complaint No. 5:07-MJ-011 filed 01/31/07

APPENDIX D

No. 07-10787

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SERGIO MARTINEZ-GUERRERO,
a/k/a Tony Guerrero-Salvador

Defendant-Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

EXCERPT OF FACTUAL RESUME FROM APPELLANT'S INITIAL BRIEF CRIMINAL APPEAL

* * *

C. The Relevant Facts.

Martinez-Guerrero's Factual Résumé set out the following:

On or about January 26, 2007, in the Lubbock Division of the Northern District of Texas, and elsewhere, Sergio Martinez-Guerrero, defendant, an alien, entered, attempted to enter, and was found in the United States of America after having been denied admission, excluded, deported, and removed there from at or near the Port of Deportation at El Paso, Texas, on or about August 31, 2006, and not having obtained the express consent of the Attorney General of the United States and the Secretary of Homeland Security to apply for readmission to the United States since the time of his previous denial of admission, exclusion, deportation, and removal there from. In violation of Title 8 U.S.C. § 1326 and 6 U.S.C. §§ 202(3), 202(4) and 557.

Sergio Martinez-Guerrero, defendant, is a native and citizen of the country of Mexico. Martinez-Guerrero was deported from the United States to Mexico on August 31, 2006, at El Paso, Texas. On January 26, 2007, Martinez-Guerrero was found in Tahoka, Texas, by an immigration agent. Martinez-Guerrero had not received the consent of the consent of the Attorney General of the United States or the Secretary of Homeland Security to apply for readmission to the United States since the time of his previous denial of admission, exclusion, deportation, and removal there from.

* * *

Respectfully submitted,

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APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA

No. 5-07-CR-0014-C

v.

USM No. 34701-177

SERGIO MARTINEZ-GUERRERO
a/k/a "Tony Guerrero-Salvador"

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1,1987)

The defendant, SERGIO MARTINEZ-GUERRERO a.k.a. "Tony Guerrero-Salvador", was represented by David E. Sloan.

The defendant pleaded guilty to count 1 of the indictment filed on 02/21/2007. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense
8 U.S.C. § 1326 and 6 U.S.C. §§ 202(3) & (4) & 557	Illegal Re-entry After Deportation

Date of Offense	Count Number
01/26/2007	1

As pronounced on 08/13/2007, the defendant is re-sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. **The sentence imposed on July 20, 2007, having been corrected due to clerical error upon motion by the Defendant, the defendant is re-sentenced.**

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 13th day of August, 2007.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

FILED: AUG 13, 2007

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **24 months** with this term of imprisonment to run consecutive with any sentence imposed in Case No. 01CR055949, Durham County District Court, Durham, North Carolina.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI La Tuna, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance use.
☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or

restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled

substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. As a further condition of supervised release, if ordered deported or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be in the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall not illegally re-enter the United States, if deported.

2. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX F

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3584 - Multiple Sentences of Imprisonment

(a) Imposition of concurrent or consecutive terms.— If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms. — The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentences as an aggregate. — Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for

administrative purposes as a single, aggregate term of imprisonment.

18 U.S.C. § 3553 - Imposition of a Sentence

(a) Factors to be considered in imposing a sentence. — The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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(2)

No. 07-1362

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In the Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has the authority under 18 U.S.C. 3584(a) to direct that a federal sentence be served consecutively to a state sentence that may be imposed in future state court proceedings.

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In the Supreme Court of the United States

No. 07-1362

SERGIO MARTINEZ-GUERRERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter, but the judgment is reprinted in 262 Fed. Appx. 664.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2008. The petition for a writ of certiorari was filed on April 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Northern District of Texas on one count of illegally entering the United States after having been previously deported, in violation of 8 U.S.C. 1326. The district court sentenced

him to 24 months of imprisonment and ordered that the federal sentence run consecutively to any state sentence subsequently imposed by the state court in connection with a pending misdemeanor charge in North Carolina. The district court also imposed three years of supervised release. Pet. App. 13a-16a. The court of appeals summarily affirmed. *Id.* at 1a-2a.

1. Petitioner is a citizen of Mexico. In August 2006, he was deported from the United States to Mexico. In January 2007, an immigration agent found him in Tahoka, Texas. Petitioner had not received the consent of the Attorney General or the Secretary of Homeland Security to apply for readmission to the United States. Pet. App. 11a.

Petitioner was indicted on one count of illegally reentering the United States after deportation, in violation of 8 U.S.C. 1326. Pet. App. 7a-8a. Petitioner pleaded guilty to the indictment. *Id.* at 4a.

The Presentence Report (PSR) indicated that petitioner had previously been deported 17 times. It also stated that petitioner had a pending misdemeanor charge in state court in Durham, North Carolina, alleging that in October 2001, he committed a misdemeanor assault on a woman. PSR paras. 28, 56.

At the initial sentencing, the district court imposed a sentence of 42 months of imprisonment and ordered it "to run consecutive with" any sentence imposed in the pending state misdemeanor charge. 7/20/07 Sent. Tr. 4. In imposing that sentence, the court noted that petitioner had previously been deported 17 times. It also observed that petitioner had been arrested for driving while impaired, but that there was no final adjudication in that case because he had failed to appear. The court explained that the 42-month sentence, an upward vari-

ance from the advisory Sentencing Guidelines range of zero to six months of imprisonment, was justified in order to reflect the seriousness of petitioner's offense in light of his "history," including his conduct demonstrating a lack of respect "for the laws of the United States or the borders of this country." The court also based the sentence on affording adequate deterrence and protecting the public "from this individual who is intent on reentering the United States unlawfully out of total and complete disregard of the laws of this country." *Id.* at 5-6.

Petitioner objected to the "imposition of time consecutive to an, as yet, unimposed sentence." 7/20/07 Sent. Tr. 6. The district court rejected the objection on the ground that Fifth Circuit precedent permits the imposition of consecutive sentences. *Id.* at 7.

Upon petitioner's motion, the court subsequently amended its sentence to a term of 24 months of imprisonment to conform to an applicable statutory maximum. The court likewise imposed that term to run consecutively to any sentence imposed in the state case. Pet. App. 14a-15a.

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner's argument that the district court lacked authority to direct that his sentence be served consecutively to an as-yet-unimposed state sentence. *Ibid.* The court held that petitioner's argument was foreclosed by its decision in *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.), cert. denied, 500 U.S. 925 (1991), abrogated on other grounds by *United States* v. *Candia*, 454 F.3d 468, 472-473 (5th Cir. 2006). Pet. App. 1a-2a.

3. According to the Bureau of Prisons, petitioner's anticipated release date is October 22, 2008.

ARGUMENT

Petitioner renews his claim (Pet. 7-14) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. Petitioner is correct in pointing out (Pet. 5-7) that the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In addition to the Fifth Circuit, the courts of appeals for the Eighth, Tenth, and Eleventh Circuits have held that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Mayotte*, 249 F.3d 797, 798-799 (8th Cir. 2001) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995). The courts of appeals for the Second, Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *United States* v. *Donoso*, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); *Romandine* v. *United States*, 206 F.3d 731, 737-738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (9th Cir. 1991); see also *United States* v. *Smith*, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence).[1]

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[1] Notably, while the Seventh Circuit concluded in *Romandine* that a district court cannot "*declare* that his sentence must run consecutively to some sentence that may be imposed in the future," that is nonetheless the consequence, "by force of law," of the last sentence of 18 U.S.C. 3584(a). 206 F.3d at 737-738. The court explained that the last sentence of Section 3584(a) establishes a default rule of consecutive sentences

Resolving that conflict is unnecessary, however, and further review is not warranted. The Court has recently denied review of the same issue presented by petitioner in numerous cases. See *Lopez* v. *United States*, 128 S. Ct. 705 (2007) (No. 07-5060); *King* v. *United States*, 128 S. Ct. 706 (2007) (No. 07-5307); *Cox* v. *United States*, 547 U.S. 1127 (2006) (No. 05-454); *Lackey* v. *United States*, 545 U.S. 1142 (2005) (No. 04-9286); *Martinez* v. *United States*, 543 U.S. 1155 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136). There is no reason for a different result here. Indeed, because petitioner will complete service of his federal sentence on October 22, 2008, and has not even been formally charged in the anticipated state case, a decision on the question presented will almost certainly have no practical impact on petitioner.[2]

"covering all situations not otherwise provided for," including where the federal sentence precedes the state sentence. *Id.* at 738. Under the Seventh Circuit's analysis, although the district court would not have had the power affirmatively to declare that its sentence was to run consecutively to a yet-to-be-imposed state sentence, the same result could have been achieved simply by not ordering that the sentences be served concurrently. The Tenth Circuit also construed the last sentence of Section 3584(a) to apply to a federal sentence imposed before a state sentence. See *Williams*, 46 F.3d at 59. The Second and Sixth Circuits take a different position, stating that the final sentence of Section 3584(a) applies only if the defendant is already subject to a state sentence at the time of the federal sentencing. *Donoso*, 521 F.3d at 149; *Quintero*, 157 F.3d at 1039-1040; see also *Smith*, 472 F.3d at 226-227. The Fifth Circuit did not address the meaning of the final sentence of Section 3584 in this case, nor in the opinion on which it relied. See *Brown*, 920 F.2d at 1216-1217.

[2] There is also no reason to hold this case for *Oregon* v. *Ice*, cert. granted, No. 07-901 (Mar. 17, 2008), which presents the question whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296

1. Resolving whether district courts have the power to impose a sentence that is to run consecutively to a yet-unimposed state sentence is unnecessary, because the adoption of one legal rule or the other has little if any practical effect. The courts of appeals that have held that district courts have authority under Section 3584(a) to provide that a federal sentence runs consecutively to a later-imposed state sentence have not held that the court's order is binding on the state court. While such an order, if authorized, may be binding (to the extent possible) on the Bureau of Prisons (BOP),[3] at least one of those courts has expressly stated that the federal order does not limit the state court's sentencing options, *Andrews*, 330 F.3d at 1307 n.1; and another has observed that it "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently

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(2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant. Unlike the sentencing scheme at issue in *Ice*, Section 3584 does not require that a court find an additional fact, not found by a jury or admitted by the defendant, before imposing consecutive sentences. See 18 U.S.C. 3584. Nor does petitioner contend that the district court's order in this case violated *Apprendi* and *Blakely*.

[3] Accordingly, petitioner errs (Pet. 22-23) in asserting that, if an order under Section 3584 does not bind the state court, it is necessarily impermissible as outside the scope of "legitimate judicial power." It is one thing to say that a federal sentencing order binds federal actors implementing the sentence. It is quite another to say that it binds a state system that implements the will of a separate sovereign. Cf. Pet. 13; *United States* v. *Gonzales*, 520 U.S. 1, 11 (1997) (in a case involving consecutive sentences under 18 U.S.C. 924(c)(1), which then provided that no term of imprisonment imposed under that section "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the § 924(c) term of imprisonment").

with the federal sentence if it chose to do so," *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008) (discussing *Brown*, *supra*). The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of the case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. *Williams*, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, without addressing the practical implementation of that statement, *Mayotte*, 249 F.3d at 799, but has also said that "[o]nly the BOP has the authority to determine when a federal sentence commences" when a prisoner is in primary state custody and returned to the state courts for disposition of state charges, such that the federal sentencing court's authority consists of making a "recommendation" concerning whether a "federal sentence run[s] concurrent with the yet-to-be-imposed state sentence[]." *United States* v. *Hayes*, 2008 WL 2917652, at *2-*3 (8th Cir. July 31, 2008).

The Seventh Circuit—which *agrees* with petitioner's view that Section 3584(a) does not authorize a district court to require its sentence to be served consecutively to an anticipated state sentence, but which also believes that the last sentence of Section 3584(a) "automatically" and by "force of law" makes such sentences consecutive —holds that, despite that effect of Section 3584(a), "[t]he *next* judge in line may make service concurrent in practical effect" and that "the effective decision" on whether to make the sentences concurrent or consecutive therefore "then is made by the Attorney General (or the state judge)." *Romandine*, 206 F.3d at 738. For that reason, the *Romandine* court expressed the view

that the correct "answer" to the circuit split "does not matter, and the conflict is illusory." *Ibid.*

Petitioner's effort to identify a concrete practical effect from the conflict is unpersuasive. Petitioner contends (Pet. 20) that, despite the fact that a district court's order that its sentence be served consecutively to an anticipated state sentence has not been held binding, state courts may feel constrained to give effect to the federal court's position when the state court otherwise would have imposed a concurrent sentence. Petitioner offers no support for that proposition, and at least one court of appeals has encouraged the opposite view. See *Andrews*, 330 F.3d at 1307 n.1 ("The fact that the federal district court elected to sentence [the defendant] to a consecutive federal sentence by no means limits the sentencing options available to the state court."). And, in any event, in deciding an appropriate sentence, a state court may properly take into account the federal court's intent that the defendant serve cumulative sentences for his separate offenses. *Id.* at 1308 n.1 (state judge is "free * * * to recognize [that] the intent of the federal sentence is for the defendant to serve separate time for both his state and federal charges").

As a practical matter, moreover, under current decisions of the courts of appeals, a state court that subsequently sentences a defendant controls whether its sentence will run concurrently with or consecutively to a previously imposed federal sentence. When a defendant is in primary federal custody, a state court can make its sentence effectively concurrent to federal sentences by designating the defendant's federal institution for service of the state sentence. When a defendant is in primary state custody, a state court can make the state sentence effectively concurrent to a federal sentence by

adjusting the length of the state sentence to take into account the defendant's federal sentence, or by suspending a portion of the state sentence.

Petitioner contends (Pet. 21) that those approaches "imperil[] a state's ability to achieve its sentencing objectives, particularly when a defendant is in state custody." But the sentencing rule that petitioner advocates (*i.e.*, barring a federal court from ordering the federal sentence to run consecutively to a later-imposed state sentence) would not entirely solve the problems that he identifies. Even if a district court's order is silent on whether a federal sentence is to run concurrently with or consecutively to an as-yet-unimposed state sentence, a state court that sentences a defendant who is in primary state custody cannot guarantee that its sentence will be concurrent unless it reduces the length of its sentence to take account of the federal sentence. That is so because whether a defendant receives credit against his federal sentence for time spent in state detention before the commencement of his federal sentence is a question that will be determined by the federal BOP, not by the state court. See *United States* v. *Wilson*, 503 U.S. 329 (1992) (holding that BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should receive for time spent in official detention before the commencement of his federal sentence). Federal authorities are neither required to grant a defendant credit for a state sentence nor required to allow a state prisoner to serve his state sentence in federal prison. See *Jake* v. *Herschberger*, 173 F.3d 1059, 1066 (7th Cir. 1999) ("[t]he state court's designation of [a defendant's] state sentence as concurrent with his prior federal sentence create[s] no obligation on the Attorney General to provide him with credit for time served in the

state prison," and a state right to be tendered to federal authorities to serve a concurrent state sentence in federal prison "creates no obligation for the federal authorities to accept the prisoner so tendered"). The views of the federal sentencing court will play a key role in that determination.[4]

Finally, petitioner argues (Pet. 20-21) that requiring state courts to engage in various maneuvers to effectuate their sentencing intentions "promotes a spirit of unseemly gamesmanship." Pet. 21. But so long as courts regard each sovereign as entitled to decide whether its punishment should be cumulative of the other's, the later-sentencing sovereign often has an advantage in effectuating its goal.

2. In any event, review is not warranted in this case because any decision on the merits is unlikely to have

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[4] A state court, a state prison system, or a defendant in state custody can ask BOP to designate a state prison for concurrent service of a federal sentence. Under those circumstances, BOP will consider, among other factors, the views of the federal sentencing court, and it will seek the sentencing court's recommendation when the court's intention is not obvious from its sentencing order. See 18 U.S.C. 3621(b)(4); Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05, Designation of State Institution for Service of Federal Sentence* 4-7 (2003). A sentencing order that is already clear on its face obviates the need for the sentencing court to revisit the question whether a consecutive or concurrent sentence is appropriate. See *id.* at 6 ("In making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), the [Regional Inmate Systems Administrator] will send a letter to the sentencing court * * * inquiring whether the court has any objections."). Whether or not embodied in a judgment, the view of the federal court that a concurrent designation is not appropriate is highly significant in BOP's determination. *Id.* at 6-7.

any effect on petitioner. Petitioner has not yet been formally charged, let alone convicted and sentenced, on the pending state misdemeanor charge. As of the date of this filing, the State has not filed a detainer against petitioner. In light of petitioner's anticipated release date of October 22, 2008, petitioner's federal term of imprisonment will likely expire before the resolution of the state misdemeanor case. At bottom, petitioner cannot claim harm from the court's order that his federal sentence be served consecutively to the North Carolina charge if he is released before the State sentences him. By the same token, even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a), vacate the judgment of the court of appeals, and remand the case for resentencing, relief would be unavailing because petitioner would have completed serving his federal sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

The Government acknowledges that the courts of appeals are deeply divided on the question whether a district court may order a federal sentence to be served consecutively with a state sentence that has yet to be imposed. The Government also makes no attempt to defend that pratice on the merits. The Government nonetheless argues that the Court should never review this persistent conflict, and it should never correct this unlawful practice, because that practice has no "practical effect" on the administration of justice. The Government further argues that the practice has no practical effect in this case.

The Government's arguments for opposing review are wholly unpersuasive. These orders place an illegitimate obstacle in the path of defendants seeking a concurrent state sentence; they promote unseemly gamesmanship between state and federal authorities; they imperil state sentencing objectives; and they denigrate federal judicial power. And petitioner himself remains subject to the impermissible effects of the order issued in this case because it prejudices his opportunity to obtain a concurrent sentence from the state court.

The Government points to the law in the circuits that sanction this practice as a basis for concluding that nothing serious is amiss. But a review of those decisions only confirms the pressing need for review. According to those decisions, the challenged sentencing orders may or may not be binding on state courts; they may or may not be binding on the Bureau of Prisons ("BOP"); and even if the orders are binding on state courts, those courts can defy them

and get away with it. Some decisions even suggest that BOP has the raw power to defy both the state and federal courts and impose its own sentencing scheme. To allow this practice to continue is to celebrate chaos. It also promotes intolerable sentencing disparities and makes a mockery of the comity this Court has long called for in the sentencing context. This Court should grant the petition and put an end to this persistently troublesome and wholly illegitimate practice.[1]

ARGUMENT

1. The Government acknowledges that the courts of appeals have divided, 4-4, on the question presented by this case: whether a federal district court has the authority to direct that a sentence be served consecutively with a yet-to-be-imposed state sentence. Opp. 4. There is no question that this entrenched division in the circuits, like the satellite litigation it has spawned, *see* Pet. 17, will persist unless and until this Court grants review.[2]

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[1] As the Government explains, the Court has denied certiorari on this issue on a number of occasions. In those cases, however, there was either a case-specific reason for the denial, or the petition did not expose the inadequacy of the Government's reasons for opposing review.

[2] As the Government notes, one of the circuits holding that courts have no authority to issue a sentence that is consecutive with a yet-to-be imposed state sentence has also held that the last two sentences of 18 U.S.C. § 3584(a) make the sentence automatically consecutive. *Romandine v. United States*, 206 F.3d 731, 737-38 (7th Cir. 2000). That holding is no more defensible on the merits than the holding that courts have authority to issue such orders, *see* Pet. 9-10, and the Government does not suggest otherwise. Moreover, as the Government ac-

2. The Government is notably unwilling to defend the merits of the district court's decision to make its sentence consecutive with a state sentence that has not been imposed. When confronted with (1) the plain text of 18 U.S.C. § 3584(a); (2) the requirement of reasoned sentencing imposed by 18 U.S.C. § 3584(b); (3) the general principle that Congress is not presumed to encroach on significant state interests unless it has made its intent to do so "unmistakably clear," *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); (4) the legislative history of the statute; and (5) its own recent failing, in a departure from usual practice, to offer any defense of the rule adopted below (Pet. 7-14, 19), the Government's opposition is conspicuously silent. That silence speaks volumes. It is only fair to conclude at this point that the Government is unwilling to defend this practice on the merits, because it believes that this practice cannot be defended. Indeed, it cannot: petitioner's sentence is, by any measure, wholly unauthorized.

3. The Government nonetheless argues that resolution of the conflict presented by this case is "unnecessary" because "the adoption of one legal rule or the other has little if any practical effect" on the ad-

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knowledges, that Seventh Circuit holding has been squarely rejected by two other circuits. *See* Opp. 5 n.1 (citing cases from the Second and Sixth Circuits). Because the meaning of last two sentences of § 3584(a) is squarely it issue here, Pet. 9-10, the resolution of the question in this case will likely resolve the conflict created by the Seventh Circuit's decision as well. In any event, the 4-4 conflict at issue here warrants review on its own terms, even if the Court's resolution of it does not squarely reject the Seventh Circuit's aberrational and indefensible ruling.

ministration of justice generally or "on petitioner." Opp. 6, 10-11. The Government is incorrect. The practice at issue in this case has subjected countless defendants to illegal sentences, wreaked havoc on the spirit of comity that should govern federal-state sentencing relations, and treated the federal judiciary as a powerless advisory tribunal. Contrary to the Government's claim, the "practical effect" of the sentences challenged here (Opp. 6) is another reason to grant the petition, not a reason to deny it.

a. It would seem virtually undeniable that a district court "order" that a future state sentence is to be consecutive with the federal sentence places a serious obstacle in the path of a defendant who seeks a concurrent sentence in state court. The Government's sole response is that state courts *might* not view such "orders" as "binding," and therefore *might* fail to follow them. But the Government simply fails to explain why a state court would view as nonbinding a federal court "order" that is facially applicable and formally directs that any state sentence is to be served consecutively with the federal sentence.

The most the Government can offer is that *one circuit* has taken the view that such orders are not binding on state courts. Opp. 8 (citing *United States v. Andrews*, 330 F.3d 1305, 1306-07 (11th Cir.) (per curiam), *cert. denied*, 540 U.S. 1003 (2003)). That is hardly a sufficient basis for the Government's speculation that state courts will not view federal court sentencing orders as binding, particularly when *other circuits have made it absolutely clear that the orders are binding on state courts. See United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*,

516 U.S. 926 (1995); *United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001) (per curiam).

Equally important, even if the state courts do not view the orders as legally binding, the Government offers no reason why state courts will not feel impelled to comply with them solely for reasons of comity. This Court has often emphasized the fundamental role comity plays in the relationship between state and federal courts. *E.g.*, *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922). In the end, the Government cannot reasonably dispute that, at the very least, a federal court order that a state sentence is to be served consecutively with a yet-to-be-imposed state sentence places a defendant at a severe disadvantage when he seeks a concurrent sentence from a state court.

b. Moreover, to the extent that some state courts try to circumvent these illegitimate orders, the result is to create a spirit of gamesmanship rather than cooperation between state and federal courts. The Government does not deny this effect, but actually celebrates it. If a state court wishes to defy or circumvent the federal court's order, the Government insists, all the State has to do is to "designat[e] the defendant's federal institution for service of the state sentence . . . or make the state sentence effectively concurrent . . . by adjusting the length of the state sentence." Opp. 8-9. The Government does not explain, however, how such subterfuge can be reconciled with this Court's call for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in sentencing. *Ponzi*, 258 U.S. at 259.

Surprisingly, the Government not only condones the gamesmanship between federal and state courts; it invites another player – BOP – into the game. According to the Government, the way the game works is that a federal court issues a consecutive sentence order hoping that a state court will be seduced into complying with it; the state court then does what it can to make the sentence effectively concurrent; and then BOP circumvents the state court order either by refusing to credit the defendant for time served on the state sentence or refusing to allow the defendant to serve his state time in federal prison. Opp. 9. Such machinations could not be further from the "spirit of reciprocal comity and mutual assistance" this Court has emphasized.

c. Furthermore, the Government does not deny that the maneuvering it would require imperils a state court's ability to achieve legitimate sentencing objectives. *See* Opp. 9. Nor could it. The options that the Government proposes simply will not work when state law imposes a mandatory minimum sentence, or when a state court judge is required to give a slap on the wrist for a serious offense in order to make its sentence effectively concurrent, or when the federal sentence is subsequently reduced because the defendant has cooperated with federal authorities. *See* Pet. 21-22.

The Government contends that such unacceptable consequences can be ignored because petitioner's approach also "would not entirely solve" the problem. Opp. 9. This is so, says the Government, because BOP can simply decide to frustrate the state's concurrent sentence by refusing to credit a defendant for time served or by refusing to accept

the defendant into federal custody. *Id.* That a problem cannot be *entirely* solved is certainly no reason not to solve almost all of it. In any event, once this Court solves the biggest problem, BOP has it within its control to solve the rest of it, and it almost certainly will. Congress has made clear that it believes that the second sentencing court is in the best position to determine whether a sentence should be concurrent or consecutive. *See* Pet. 7-14. And this Court has made clear that BOP should be guided by principles of comity in responding to legitimate state sentencing decisions. *Ponzi*, 258 U.S. at 259. Once this Court's decision in this case establishes the first point and reiterates the second, BOP will presumably respect the sentencing choices of the state court when that court is the second to impose sentence, regardless whether BOP in theory has the raw power to do something else.

d. The Government also fails to explain how treating federal court *orders* as mere suggestions to be declined at will can possibly be reconciled with the requirements of Article III. *See* Pet. 22-23 (discussing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)). The most the Government can muster is that the orders "may" be binding on BOP, even if they are not binding on state courts. Opp. 6. Ultimately, however, the Government appears to take the position that the federal orders are not even binding on BOP, *see* Opp. 9 (citing *United States v. Wilson*, 503 U.S. 329 (1992)), and that they instead amount to nothing more than "recommendations" to that agency, *id.* at 7 (citing *United States v. Hayes*, 535 F.3d 907, 910 (8th Cir. 2008)).

If the orders are not binding on state courts and are not binding on BOP, it is difficult to understand how they can be anything other than illegitimate advisory opinions. Regardless whether these orders fall outside the scope of Article III, however, it clearly denigrates federal judicial power for a federal court to issue an order that everyone in the federal and state criminal justice system is free to ignore.

e. The Government contends that the circuit decisions sanctioning sentences that are consecutive with future state sentences demonstrate that this pervasive unlawful practice has no adverse effect on the criminal justice system. *See* Opp. 6-8. A review of those decisions belies the Government's claim and reinforces the need for review.

The rules in the Eleventh Circuit are these: first, a district court is free to issue an order making the sentence consecutive. Then the state court is free to ignore that order and impose a concurrent sentence. And then BOP is required to comply with the federal court order and make the sentence consecutive again. *Andrews*, 330 F.3d at 1307 & n.1.

In the Fifth Circuit, a federal court may "forbid its sentence from being served concurrently." *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir.), *cert. denied*, 500 U.S. 925 (1991). According to dicta in another case on a different issue, however, *Brown* "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently." *United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008). The Fifth Circuit has yet to explain how a federal-court order can "forbid" a sen-

tence from being served consecutively, and yet not be binding enough to forbid any such thing.

In the Tenth Circuit, the district court can issue a consecutive sentencing order that the "state court cannot override." *Williams*, 46 F.3d at 58. A state court, however, may attempt to defy the federal court order by issuing a concurrent sentence anyway. *Id.* It is then unclear whether BOP is required to circumvent the state court order and comply with the federal order, or whether BOP is free to decide for itself whether the sentence should be concurrent or consecutive.

In the Eighth Circuit, a district court consecutive sentence order "controls" the state court. *Mayotte*, 249 F.3d at 799. But it serves only as a as a "recommendation" to BOP, which ultimately may decide for itself whether a sentence will be concurrent or consecutive. *Hayes*, 535 F.3d at 909-11.

These decisions do not, as the Government suggests, demonstrate that the system is working. They demonstrate the opposite: there is undeniable chaos in the federal system that requires this Court's immediate intervention.

f. Finally, the Government argues that review in this case is unwarranted because "petitioner's federal term of imprisonment will likely expire before the resolution" of the state charges pending against him, and "petitioner cannot claim harm from the court's order that his federal sentence be served consecutively to the North Carolina charge if he is released before the State sentences him." Opp. 10-11. The Government further argues that a decision by this Court vacating the consecutive sentence order

would not provide any benefit to petitioner. *Id.* These arguments are unexplained and inexplicable.

If petitioner completes his federal sentence before North Carolina tries petitioner on his outstanding charges, he will still be subject to an outstanding, facially binding, district court *order* requiring that petitioner's federal sentence be consecutive with any sentence imposed in the North Carolina case. *See* Pet. App. 4a-5a. That order will continue to have the same prejudicial effect it has had on petitioner from the beginning: it prejudices petitioner's opportunity to obtain a concurrent sentence from the state court if and when he is tried and convicted of the outstanding charges against him. At that point, the state court sentencing petitioner will be presented with a federal court order requiring petitioner's state sentence to be consecutive rather than concurrent.

To the extent that the Government's point is that the state court could ignore the order and impose a concurrent sentence, that is just a rehash of the Government's general argument to that effect, and it is unpersuasive for the same reason. If the order is viewed as binding by the state court, petitioner will be foreclosed from even seeking a concurrent sentence. But even if it is not viewed as binding, it is still entitled to comity, and that places petitioner at a serious disadvantage in obtaining a concurrent sentence. Petitioner is entitled to have that impermissible obstacle to obtaining a concurrent sentence removed. And that is no less true once petitioner is released from federal custody than it is today.

By the same token, an order by this Court vacating the district court consecutive sentence order will provide petitioner with complete relief. At that point, petitioner will be in a position to seek a concurrent sentence from the state court without that request being prejudiced by an illegitimate federal court consecutive sentence order.

* * *

The Government acknowledges the existence of an entrenched circuit split and refuses to defend the merits of the sentencing practice employed by the district court in this case. Its only argument against review – that the practice of imposing federal sentences consecutive with future state sentences has no "practical effect" – is demonstrably wrong. The system as it stands subjects countless defendants, including petitioner, to inequitable sentencing disparities, and it pits federal courts, state courts, and BOP against one another in a constant struggle that undermines comity in sentencing and respect for federal judicial power. This Court should grant review and put this illegitimate practice to an end.[3]

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[3] Counsel in this case intends to file, by September 30, petitions seeking review in two other cases that present the same question. Those petitions involve defendants whose anticipated release dates are July 11, 2009, and August 1, 2009. The Court may wish to hold the present petition so that it can act on all three petitions at once.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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